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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPHINE BURRISS,
Petitioner,

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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QUESTION PRESENTED

1. Under what circumstances is it constitutional for a state, in a statutory scheme of mandatory automobile insurance protection, to discriminate in the provision of benefits against retired persons whose principal source of income is from Social Security benefits and private pension benefits?

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No.

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JOSEPHINE BURRISS,
Petitioner,

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioner Josephine Burriss prays that a writ of certiorari issue to review the decision of the Supreme Court of the state of Kansas in the above-entitled case.

OPINIONS BELOW

Opinion and judgment of the Kansas Supreme Court, Case No. 83-56331-AS, entered on November 30, 1984, the opinion being reported at 236 Kan. 326, 691 P.2d 10 (1984). Order of the Kansas Supreme Court denying Motion for Rehearing entered on February 8, 1985. Decision of the Johnson County District Court, 10th Judicial District, State of Kansas, entered on September 26, 1983.

JURISDICTION

The mandate of the Kansas Supreme Court to the Johnson County, Kansas, District Court was filed on February 14, 1985. The decision of the Kansas Supreme Court was entered on November 30, 1984. A Petition for Rehearing timely filed was denied on February 8, 1985. The jurisdiction of this court is invoked under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

K.S.A. 40-3101 *et seq.*

K.S.A. 40-3103(l):

"Monthly earnings" means: (l) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury; or (2) in the case of a person not regularly employed or self-employed, or of an unemployed person, one-twelfth (1/12) of the anticipated annual earnings from the time such person would reasonably have been expected to be regularly

employed. In calculating the anticipated annual earnings of an unemployed person who has previously been employed, the insurer shall average the annual compensation of such person for not to exceed five (5) years preceding the year of injury or death, during which such person was employed.

K.S.A. 40-3103(y):

"Survivors' benefits" means total allowances to all survivors for: (1) Loss of an injured person's monthly earnings after his or her death, up to a maximum of not less than six hundred fifty dollars ($650) per month; and (2) substitution benefits following the injured person's death. Expenses of the survivors which have been avoided by reason of the injured person's death shall be subtracted from the allowances to which survivors would otherwise be entitled, and survivors' benefits shall not be paid for more than one (1) year after the injured person's death, less the number of months the injured person received disability benefits prior to his or her death.

STATEMENT OF THE CASE

The facts in this case are undisputed and the sole issue involved was the constitutionality of certain portions of the Kansas Automobile Injury Reparations Act (KAIRA), also known as the Kansas No-Fault Act. K.S.A. 40-3101 *et seq.* Petitioner Josephine Burriss is a resident of Johnson County, Kansas, and is the widow of Lloyd Burriss. Because the Burrisses owned a motor vehicle principally garaged in the state of Kansas, they were required to and did purchase a policy of automobile insurance containing certain minimum limits of liability cov-

erage as well as statutorily mandated personal injury protection benefits. The policy was purchased from the respondent, Northern Assurance Company.

Both Mr. Burriss and Mrs. Burriss were retired and received Social Security benefits as well as private pension benefits. Mr. Burriss was killed in an automobile accident occurring in the state of Indiana on October 11, 1982. By reason of Mr. Burriss's death, Mrs. Burriss suffered an immediate loss of $153.00 per month from Mr. Burriss's private pension and a decrease of $483.00 per month in the total amount of Social Security benefits received. The total financial loss of monthly income to the Burriss household solely as a result of Mr. Burriss's death was $636 per month. Mrs. Burriss saved no expenses by reason of her husband's death.

Petitioner demanded from respondent payment of survivor's benefits in the amount of $636 per month for a period of twelve months, representing the amount of the monthly loss suffered by Mrs. Burriss as a result of her husband's death. The Burriss's policy included the statutory minimum amount of survivor's benefits of $650 per month for a period of twelve months. Respondent refused to pay any survivor's benefits on the basis that they were payable only to replace the decedent's lost earnings and since the decedent had retired at the time of his death, there were no lost earnings.

Petitioner filed suit in the District Court of Johnson County on May 10, 1983, praying for a declaratory judgment that the KAIRA was unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution to the extent that it denied retired persons and their survivors equal protection of the law and due process of law. *See* App. at A32, Count I. In addition,

petitioner sought to recover survivor's benefits of $636 per month for twelve months together with interest and attorney fees.

Respondent filed a motion for judgment on the pleadings and petitioner responded with a motion for summary judgment. The District Court of Johnson County, The Honorable G. Joseph Pierron, sustained petitioner's motion, finding that the statute did unconstitutionally discriminate against retired persons. He ordered the insurance policy reformed to comport with a constitutional construction of the statute and entered judgment for petitioner for survivor's benefits as prayed for.

Respondent appealed to the Kansas Supreme Court and on November 30, 1984, the Supreme Court reversed the district court in a unanimous decision, finding that the statute was constitutional and that the Kansas Legislature had rationally drawn a distinction between employed persons and unemployed persons. Petitioner's motion for rehearing by the Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

1. The decision of the Kansas Supreme Court permits a state to discriminate against retired persons whose primary or sole source of support is from Social Security benefits and private pension plans.

Recent years have brought a proliferation of no-fault statutes in the several states throughout the country. While each statute differs in its particulars, the general purpose is to reduce the necessity for tort litigation requiring fault determination in motor vehicle cases and replace it in whole or in part with a system of first-person insurance benefits for payment of certain financial losses

without a determination of fault. Most of the no-fault statutes, like the Kansas one, mandate the purchase of minimum limits of personal injury protection benefits for which the insured is, of course, required to pay a premium. The primary purpose of the Kansas statute is set forth in K.S.A. 40-3102 and is as follows:

> The purpose of this act is to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages to the extent provided herein.

A similar purpose is either expressed or implied in no-fault legislation of most other states.

The Kansas Legislature, however, in providing for payment of the personal injury protection benefits has chosen to base entitlement to those benefits not upon the question of whether or not a financial loss has been suffered, but rather upon the source of the income that was lost and upon the employment status of the insured person who is injured or killed. Thus under the KAIRA, two survivors having financial losses of income identical in amount and effect may be treated differently in the provision of benefits, depending upon whether the lost income had been from employment or from Social Security and private pension benefits.

The Kansas Supreme Court made it clear in its opinion that it was constitutionally permissible under the Fourteenth Amendment to discriminate against those whose source of income is principally Social Security and private pension as opposed to earnings from employment. The Kansas Supreme Court, in approving the distinction, focused upon the admittedly protected status of wages in many other statutory contexts, but ignored the fact that

Congress has afforded even greater protection and deference to Social Security benefits and most private pension benefits. *See* 42 U.S.C. § 407 (exempting Social Security benefits from garnishment); 42 U.S.C. § 405 (procedural protection from termination of benefits); 11 U.S.C. § 522 (d)(10) (exempting most pensions in bankruptcy).

The constitutional question is not, as suggested by the Kansas Supreme Court, a comparison of working people whose survivors suffer a financial loss by reason of their death and unemployed persons whose survivors do not suffer such a financial loss. Rather, the distinction that the Kansas Supreme Court approved is requiring payment of benefits to survivors of workers who lose their income but denying such benefits to survivors of pensioners who lose the same amount of monthly income.

The important questions presented by this petition are whether the source of the decedent's income lost to the survivors is a constitutionally permissible basis for allowing or disallowing payment of survivor's benefits and under what circumstances a state may discriminate against Social Security recipients and pensioners in the payment of benefits pursuant to a program of mandatory automobile insurance.

These questions are of national concern both because of the number of state-enacted mandatory insurance programs throughout the country as well as the congressionally-declared policy to afford considerable protection to recipients of Social Security benefits and private pensions. While the Kansas Supreme Court correctly recognized the degree of protection traditionally afforded the wage earner and his or her family, its elevation of earned income to a preferential status over retirement income appears to be without precedent and further appears to be in conflict with Congress's expressed protection of such income.

CONCLUSION

Because of the number of states having no-fault insurance statutes, the increasing percentage of retirees in our population, and society's interest in protecting the modest amounts of retirement income available to most of the elderly, petitioner's writ should be granted to determine the important issues raised.

Respectfully submitted,

DAVID P. TROUP
Attorney for Petitioner

APPENDIX

No. 56,331

JOSEPHINE BURRISS,
Appellee,

v.

NORTHERN ASSURANCE COMPANY OF AMERICA,
Appellant.

SYLLABUS BY THE COURT

1. Social security and retirement benefits do not constitute "monthly earnings" as defined in K.S.A. 40-3103(l). [Following *Bradley v. AID Insurance Co.*, 6 Kan. App. 2d 367, 629 P.2d 720 (1981).]

2. The Kansas Automobile Injury Reparations Act, K.S.A. 40-3101 *et seq.*, providing certain benefits to injured employed persons and their survivors, and not to nonemployed persons and their survivors, is examined and held not to violate the due process or equal protection clauses of the United States Constitution.

Appeal from Johnson District Court; G. JOSEPH PIERRON, JR., judge. Opinion filed November 30, 1984. Reversed.

Paul Hasty, Jr., of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, argued the cause, and *David K. Knowles*, of the same firm, was with him on the brief for appellant.

David P. Troup, of Weary, Davis, Henry, Struebing & Troup, of Junction City, argued the cause and was on the brief for appellee.

L. M. Cornish and *Richard Harmon,* of Glenn, Cornish, Hanson & Karns, Chartered, of Topeka, were on the brief for *amicus curiae* Kansas Association of Property and Casualty Insurance Companies, Inc.

The opinion of the court was delivered by

MILLER, J.: This is an appeal by the defendant, Northern Assurance Company of America, from a judgment of the District Court of Johnson County, finding two provisions of the Kansas Automobile Injury Reparations Act, K.S.A. 40-3103(l) and (y), unconstitutional and entering judgment for the plaintiff, Josephine Burriss. The determinative question on appeal is the constitutionality of the statute.

The facts are not in dispute. Lloyd Burriss and his wife, Josephine Burriss, residents of Johnson County, were the named insureds in an automobile insurance policy issued by the defendant, Northern. The policy contained a personal injury protection (PIP) endorsement in compliance and in conformity with the Kansas Automobile Injury Reparations Act, K.S.A. 40-3101 *et seq.* The insureds were not given the option to accept or reject the PIP endorsement; they were charged a premium for that endorsement; the premium was not based upon their income or employment status. On October 11, 1982, while the policy was in force, Lloyd Burriss was killed when the motor vehicle which he was then operating was involved in a collision.

At the time of his death, Mr. Burris was retired. He received monthly social security payments of $534 and

monthly pension payments from a former employer of $153. The pension terminated upon his death, and the social security benefits were reduced to $51 per month. Plaintiff made demand upon Northern for payment of $636 per month for one year in survivor's benefits under the PIP endorsement. When payment was refused, she brought this suit.

The petition was framed in two counts. In the first, plaintiff contended that K.S.A. 40-3103(l) and (y) are unconstitutional in that they deny plaintiff due process and equal protection. In the second count, she sought to have the policy reformed to conform to the statute as construed by the court, and to recover survivor's benefits. The pertinent portions of the statute read as follows:

> "*40-3103. Definitions.* As used in this act, the following words and phrases shall have the meanings respectively ascribed to them herein: . . . .
>
> . . . .
>
> "(l) 'Monthly earnings' means: (1) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury; or (2) in the case of a person not regularly employed or self-employed, or of an unemployed person, one-twelfth (1/12) of the anticipated annual earnings from the time such person would reasonably have been expected to be regularly employed. In calculating the anticipated annual earnings of an unemployed person who has previously been employed, the insurer shall average the annual compensation of such person for not to exceed five (5) years preceding the year of injury or death, during which such person was employed.
>
> . . . .

"(y) 'Survivors' benefits' means total allowances to all survivors for: (1) Loss of an injured person's monthly earnings after his or her death, up to a maximum of not less than six hundred fifty dollars ($650) per month; and (2) substitution benefits following the injured person's death. Expenses of the survivors which have been avoided by reason of the injured person's death shall be subtracted from the allowances to which survivors would otherwise be entitled, and survivors' benefits shall not be paid for more than one (1) year after the injured person's death, less the number of months the injured person received disability benefits prior to his or her death."

Defendant, in response, filed a motion for judgment on the pleadings pursuant to K.S.A. 60-212. It stated in the motion that "there are no material issues of fact between the parties." Plaintiff responded with a motion for summary judgment, supported by a memorandum and an affidavit reciting the facts. The trial court heard both motions, considered the memorandum and affidavit, and accepted as uncontroverted the facts set out in plaintiff's memorandum and affidavit. Since matters outside the pleadings were presented and considered, the court treated the defendant's motion as one for summary judgment. K.S.A. 60-212(c). In a carefully prepared memorandum decision, the trial court overruled defendant's motion, sustained that of the plaintiff, and entered judgment accordingly. Defendant appeals.

The constitutionality of the Kansas Automobile Injury Reparations Act has been challenged before, although not upon identical grounds. We reviewed at length the various provisions of the act, and the principles to be applied when a statute is challenged on equal protection and due process grounds, in *Manzanares v. Bell,* 214 Kan. 589, 522 P.2d

1291 (1974). We quoted Section 2 of the act. K.S.A. 40-3102, which reads:

> "The purpose of this act is to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages to the extent provided herein."

We then said:

> "This is the heart of the Act. The rest treats of details and procedures. The legislation forms the basis for a different approach in solving the inadequacies of the tort liability system, and provides a new method of affording prompt compensation to motor vehicle accident victims. Under the declaration of Section 2 and other provisions of the Act, we now approach reparation of motor vehicle accident victims on the basis of the interest of all the citizens of this state without losing sight of, but tempering, the right of an individual to pursue traditional remedies in tort. The change is an appropriate one for the Legislature to make. . . .
>
> "It is evident the Legislature was concerned with the possible burden on society occasioned by inadequate or nonexistent compensation for economic loss suffered by motor vehicle accident victims, particularly when viewed in the context of the large number of persons and total financial loss involved. By requiring motor vehicle liability policies to include first party PIP benefits, the Legislature may have eliminated the former necessity of resorting to litigation in many cases. The requirement of PIP coverage bears a reasonable relation to the subject of reparation for losses arising out of the ownership and operation of

motor vehicles. Hence, the Kansas no-fault insurance plan being reasonably directed toward problems that affect the public welfare, including the economic welfare of the state and its citizens, the Act represents a proper and legitimate exercise of the police power of the state.

. . . .

"The plaintiff and intervenor have advanced several arguments premised upon a denial of equal protection of the law. Traditionally, the test utilized in determining if a legislative enactment violates equal protection principles is whether the classification bears a rational relation to the purpose of the legislation. (*Henry v. Bauder,* [213 Kan. 751, 518 P.2d 362 (1974)]; *Pinkerton v. Schwiethale,* [208 Kan. 596, 493 P.2d 200 (1972)]; *State v. Consumers Warehouse Market,* 183 Kan. 502, 329 P.2d 638; *McDonald v. Board of Election,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404.) The Legislature is presumed to act within its constitutional power despite the fact the application of its laws may result in some inequity. (*McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101.) The equal protection clause goes no further than to prohibit invidious discrimination. (*Williamson v. Lee Optical,* 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461.) In *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, it was said:

"'. . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27 (1885), *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *McDonald v. Board of Election Com-*

missioners, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). . . .' (l.c. 75-76.)

. . . .

"An argument has been advanced challenging as a denial of equal protection the option given owners of motorcycles to reject in writing the coverage for personal injury protection benefits. . . .

"It should be noted that this court is not made the superintendent of legislative activity under principles of equal protection. (*Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678.) Equal protection principles do not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. The principle of equal protection is not offended against simply because the exercise of the power may result in some inequality. (*Louisville & Nashville R. R. v. Melton,* 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676.) There is no precise application of the rule of reasonableness in classifying, and equality permits many practical inequalities. There need not be an exact exclusion or inclusion of persons and things. (*Magoun v. Illinois Trust & Savings Bank,* 170 U.S. 283, 42 L.Ed. 1037, 18 S.Ct. 594.) The state enjoys a wide range of discretion

in distinguishing, selecting, and classifying, and it is sufficient if a classification is practical and not palpably arbitrary. (*Orient Insurance Company v. Daggs,* 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281; *Shelton v. Phalen,* 214 Kan. 54, 519 P.2d 754; *State v. Weathers,* [205 Kan. 329, 469 P.2d 292 (1970)]; *Tri-State Hotel Co. v. Londerholm,* 195 Kan. 748, 408 P.2d 877 [1965]; *Martin v. Davis,* 187 Kan. 473, 357 P.2d 782 [1960], app. dismissed 368 U.S. 25, 7 L.Ed.2d 5, 82 S.Ct. 1 [1961]; *Board of County Comm'rs v. Robb,* 166 Kan. 122, 199 P.2d 530 [1948].) '. . . To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations . . . What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to . . . judicial review. . . .' (*Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69, 70, 57 L.Ed. 730, 734, 33 S.Ct. 441, 443.)

. . . .

"In the areas of economic and social legislation, a statutory plan does not violate the equal protection clause merely because the classifications contained therein are imperfect. (*Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536, 42 L.W. 4475; *Jefferson v. Hackney,* 406 U.S. 535, 32 L.Ed.2d 285, 92 S.Ct. 1724.) Nor does the equal protection clause require a state 'to choose between attacking every aspect of a problem or not attacking the problem at all . . .' (*Dandridge v. Williams,* 397 U.S. 471, 487, 25 L.Ed.2d 491, 503, 90 S.Ct. 1153, 1162.) The foregoing principles were stated by Mr. Chief

Justice Hughes in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578:

> '. . . This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. (Citations.) . . .' (300 U.S. at 400, 81 L.Ed. at 703, 57 S.Ct. at 585, 586.)

In *Williamson v. Lee Optical,* supra, Mr. Justice Douglas said:

> '. . . The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. *Evils in the same field may be of different dimensions and proportions, requiring different remedies.* Or so the legislature may think. (Citation.) *Or the reform may take one step at a time,* addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citations.) *The legislature may select one phase of one field and apply a remedy there, neglecting the others.*' (348 U.S. at 489, 99 L.Ed. at 573, 75 S.Ct. at 465.) (Emphasis supplied.)" 214 Kan. at 608-610, 612-615.

We concluded that the challenged provisions of the Kansas Automobile Injury Reparations Act are not unconstitutional under the due process or equal protection clauses or under any of the other provisions of the state or federal constitutions, and we upheld the act.

The same subsections of K.S.A. 40-3103 which are attacked as unconstitutional in this action were before the Court of Appeals in *Bradley v. AID Insurance Co.*, 6 Kan. App.2d 367, 629 P.2d 720, *rev. denied* 230 Kan. 817 (1981). One of the principal issues in that case was whether social security and retirement or pension benefits were to be utilized in computing survivors' benefits under K.S.A. 40-3103. The court held that they were not. Its ruling is clearly stated in Syllabus ¶ 1:

> "Social security and teacher retirement benefits do not constitute monthly earnings as defined in K.S.A. 1980 Supp. 40-3103 (*l*); and, consequently, do not qualify a survivor of the decedent for survivors' benefits under 40-3103(*y*)."

The Court of Appeals noted in the body of its opinion, p. 372, that "40-3103(*y*) and (*l*) by their terms are clearly limited to earnings from present or reasonably expected future employment." The court did not determine the constitutionality of those sections. It said:

> "Plaintiff's argument concerning the discriminating effect of such a holding has some merit; however, insofar as this argument attacks the constitutionality of the act, it is presented for the first time on appeal and then only peripherally. While the latter might not always prevent consideration, *State v. Nelson*, 210 Kan. 439, Syl. ¶ 4, 502 P.2d 841 (1972), we believe the issue should not be addressed at this time." 6 Kan. App. 2d at 372.

The no-fault act as a whole, as we held in *Manzanares*, has a legitimate purpose: to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles, providing PIP coverage and benefits

to insure prompt payment for loss and to avoid the necessity and delay of litigation. With limited exceptions, every owner of a motor vehicle operated upon Kansas highways is required to insure the vehicle against liability, and liability insurance policies are required to contain provisions for PIP coverage. See K.S.A. 40-3104 and 3107, as amended. Personal injury protection (PIP) benefits are defined in K.S.A. 40-3103(q) as:

> "[T]he disability benefits, funeral benefits, medical benefits, rehabilitation benefits, substitution benefits and survivors,' benefits required to be provided in motor vehicle liability insurance policies pursuant to this act."

PIP benefits are extended under the required policy provisions to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in the motor vehicle, and other persons struck by the vehicle and suffering bodily injury while not an occupant of a motor vehicle. K.S.A. 40-3107, as amended by Laws of Kansas, 1984, chapter 175, section 1. Funeral, medical, rehabilitation, and substitution benefits are payable regardless of the income or employment of the injured person. Disability and survivors' benefits, however, are computed upon the basis of the injured or deceased person's loss of monthly earnings. K.S.A. 40-3103 (b) and (y). Survivors of deceased persons who have had no monthly earnings are not entitled, under the act, to survivors' benefits. It is this distinction that plaintiff attacks.

Does the act deprive plaintiff of property without due process of law, or does it deny her the equal protection of the law? This is the narrow issue before us. We turn, then, to the tests which must be applied in order to determine whether a law denies due process or equal pro-

tection. In *Manhattan Buildings, Inc. v. Hurley*, 231 Kan. 20, 30, 643 P.2d 87 (1982), we discussed the tests, quoting from Justice Owsley's opinion in *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 614, 616, 576 P.2d 221 (1978):

> "'[T]he test for due process . . . [is] whether the legislative means selected had a real and substantial relation to the objective sought. The rule has been restated in terms of whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community. (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330.)
>
> . . . .
>
> "'Our next concern is whether the statute offends the equal protection clause. When considering this question we must first determine the proper test. Traditionally, the yardstick for measuring equal protection arguments has been the "reasonable basis" test. The standard was set forth in *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L.Ed.2d 393, 81 S.Ct. 1101:
>
> "'"'. . . The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . .'"
>
> "'In *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153, reh. denied 398 U.S. 914, 26 L.Ed.2d 80, 90 S.Ct. 1684, it was stated:
>
> "'"'. . . If the classification has some 'reasonable basis,' it does not offend the Constitution simply be-

cause the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. . . ." (p. 485.)

" 'A statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof. (*Henry v. Bauder*, 213 Kan. 751, 753, 518 P.2d 362; *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L.Ed. 369, 31 S.Ct. 337.)' 223 Kan. at 614, 616." *Manhattan Buildings, Inc.*, 231 Kan. at 30.

See also *Strehlow v. Kansas State Board of Agriculture*, 232 Kan. 589, 593, 659 P.2d 785 (1983), and *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 519, 646 P.2d 1078 (1982).

Under these rules, it appears that the reasonable basis test is the yardstick under which the statute must be measured, both as to equal protection and as to due process. Is there a reasonable basis for the distinction between wage earners and nonwage earners? Throughout the history of this state, the protection of wages and wage earners has been a principal objective of many of our laws. See, for example, K.S.A. 60-2307, originally enacted as G. S. 1868, ch. 38, § 6, providing that otherwise exempt personal property shall not be exempt from attachment or execution for wages; K.S.A. 44-312, enacted in 1901, giving preference to the payment of wages in the case of receiverships or assignments for the benefit of creditors; the statute restricting garnishment of wages, K.S.A. 60-2310, which reflects the rationale of G. S. 1868, ch. 80, § 490; and the wage payment act, K.S.A. 44-313 *et seq.*, enacted in 1973.

K.S.A. 40-3103, like the statutes mentioned above, gives preference to wage earners, in order that they and the families dependent upon them are not destitute. When it enacted K.S.A. 40-3103, the legislature could have included pensions, retirement income, payments from life estates, annuities and lifetime trusts, alimony, and other forms of income as "monthly earnings," but it chose not to do so. It distinguished between those persons who are employed or self-employed, on the one hand, and those who are not, on the other. It determined in substance that all Kansas motor vehicle owners must carry insurance to defray a measure of the loss sustained by wage earners or other employed persons upon their injury or sustained by their survivors upon their death, whether as drivers or passengers or as pedestrians, where the injury or death is caused by motor vehicles. It did not require that such coverage be carried to protect the nonemployed or their survivors. The legislature thus continued its long-standing policy to protect employed persons and their survivors. "Survivor" is defined by subsection (x) as "a decedent's spouse or child under the age of eighteen (18) years, where death of the decedent resulted from (a motor vehicle-related) injury."

Social security and pension benefits are easily computed, as the trial court pointed out, and dependents of persons receiving such benefits may suffer losses just as devastating as may survivors of employed persons. The legislature, however, has determined to include only employed persons, not those receiving income from other sources, though terminable or reducible upon injury or death. The legislature did not simply distinguish between employed persons and those receiving social security or retirement benefits; it made a broad distinction between those who are employed and those who are not. It sought

to protect wage earners and those dependent upon them. Such persons sustain an immediate loss when wages or self-employed income is interrupted or terminated. Many non-employed persons do not sustain the same loss. Extending the same protection to all persons injured in motor vehicle collisions would greatly increase the coverage and thus increase the cost of the insurance program. We cannot say that all persons must be included; that is a legislative and not a judicial determination.

We conclude and hold that the legislative classification rests upon reasonable grounds and furthers the legislature's objective of protecting those who are earning income, and their dependents or survivors. We further hold that the classification does not offend the equal protection or due process clauses of the United States Constitution. Plaintiff makes a persuasive argument that people dependent upon pensions, and their survivors, should be protected by PIP coverage; and the facts of this case demonstrate the loss that dependents of such a person may sustain. That argument, however, is best addressed to the legislature and not to the courts.

At the time the motions for summary judgment were argued in the trial court, there were no disputed issues of fact raised by either party, and no fact issues are now suggested which would affect the final outcome of the case. Consideration of the summary judgment motions by the trial court was not premature. The policy of insurance does not need reformation since we have determined the principal issue adversely to plaintiff, who sought the reformation. Finally, since plaintiff as a policyholder does not prevail, plaintiff is not entitled to the allowance of attorney fees.

The judgment is reversed.

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 83-56331-AS

Josephine Burriss,
Appellee,
v.
Northern Assurance Company of America,
Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellee for Rehearing.

DENIED.

Date February 8, 1985

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

(Filed February 14, 1985)

021485 0299
COMPUTER

Dist. Court No. 121301 No. 83-56331-AS

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

The State of Kansas, to the District Court within and for the County of Johnson in the State of Kansas, Greeting:

WHEREAS, In a certain civil action lately pending before you, wherein Josephine Burris plaintiff and Northern Assurance Company of America defendant a judgment was rendered by you against the said Defendant from which judgment said Defendant prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the September Session of the July Term of said Supreme Court, A. D. 1984, on consideration of the said appeal ..... it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be Reversed, attested true copy opinion attached and that the said Appellant recover against the said Appellee $55 filing fee and cost transcript Dollars for ..... costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs

Fees of Clerk Supreme Court ..... $55.00 Paid

Record .....

Transcript .....

Other costs .....

Total ..... $

WITNESS my hand and the seal of said Supreme Court affixed hereto at my office in the City Topeka, on the Feb 13 1985 day of .....

A. D. 19 .....

/s/ Lewis C. Carter

Lewis C. Carter

Clerk of the Supreme Court

(Filed September 26, 1983)

IN THE

DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

Case No. 121301

Court No. 3

JOSEPHINE BURRIS,
Plaintiff,

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,
Defendant.

MEMORANDUM DECISION

The Court has received reciprocal motions for summary judgment from both parties in this matter. The Court has received from counsel for the plaintiff fifteen uncontroverted facts which are set out at pages 2 and 3 of his brief in support of the motion for summary judgment filed July 7, 1983, which the Court believes do establish a factual basis for determining the legal issues in this case and entering summary judgment thereon.

The defendant in an abbreviated form has also set out facts which he believes supports final action by the Court to dismiss the case.

The issue presented to this court is the constitutionality of a particular portion of the Kansas Automobile Injury

Reparations Act, K.S.A. 40-3101 et seq. Particularly, the plaintiff contends that to the extent that K.S.A. 40-3103, by its definitions under Sections (l) and (y) exclude her from receiving benefits due to her husband having been retired and receiving only retirement benefits she is denied due process and equal protection under the constitutions of the State of Kansas and the United States.

It appears that the non-constitutional issues involved in this case have been resolved by *Bradley v. Aid Insurance Co.*, 6 Kan. App.2d 367, 629 P.2d 720 (1981). The Court there affirmed the contention that Kansas' no-fault insurance act does not recognize Social Security and other types of retirement benefits as monthly earnings as defined in K.S.A. 40-3103(l) and, consequently, do not qualify a survivor of the decedent for survivor's benefits under K.S.A. 40-3103(y).

As the Court pointed out at page 372 of its opinion:

> "Plaintiff's argument concerning the discriminating effect of such a holding has some merit; however, insofar as this argument attacks the constitutionality of the act, it is presented for the first time on appeal and then only peripherally. While the latter might not always prevent consideration, *State v. Nelson,* 210 Kan. 439, Syl. Para. 4, 502 P.2d 841 (1972), we believe the issue should not be addressed at this time."

It is clear then that the specific argument being presented by the plaintiff, the constitutionality of this particular provision, has not as yet been addressed by an appellate court of this State. This Court will, therefore, proceed to address that question.

Mr. Justice Fatzer in *Tri-State Hotel Company v. Londerholm,* 195 Kan. 748, 408 P.2d 877, set out clearly the

position of the Courts in determining issues pertaining to the constitutionality of legislative enactments. At page 760 he stated:

> "This court is by the Constitution not made the critic of the legislature, but rather, the guardian of the Constitution; and every legislative act comes before this court surrounded with the presumption of constitutionality. That presumption continues until the Act under review clearly appears to contravene some provision of the Constitution. All doubts of invalidity must be resolved in favor of the law. It is not in our province to weigh the desirability of social or economic policy underlying the statute or to question its wisdom; those are purely legislative matters. . . . While the legislature is vested with a wide discretion to determine for itself what is inimical to the public welfare which is fairly designed to protect the public against the evils which might otherwise occur, it cannot, under the guise of the public power, enact unequal, unreasonable or oppressive legislation or that which violates the Constitution. If the classification provided is arbitrary, . . . and has no reasonable relation to objects sought to be attained, the legislature transcended the limits of its power in interfering with the rights of persons affected by the Act. . . ."

The constitutionality of the K.A.I.R.A. has been tested in a general way before in *Manzanares v. Bell,* 214 Kan. 589, 522 P.2d 591 (1974).

At page 600 the Court stated:

> "The basis of the legislative classification is the automobile, and the No-Fault Act affects alike all who own, operate, maintain or use such a vehicle."

As was set out in *Manzanares,* pages 607 and 608, Section 2 of the Act which became K.S.A. 40-3102 is the heart of the Act.

> "The purpose of this act is to provide a means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages to the extent provided herein."

As was set out in page 610 in *Manzanares*:

> "The no-fault Act is a legislative directive to insure prompt and equitable compensation to persons injured by motor vehicles."

The portions if the Act which apply to the instant situation are subparagraphs (l) and (y) of K.S.A. 40-3103. Those sections read as follows:

> "(l) 'Monthly earnings' means: (1) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury; or (2) in the case of a person not regularly employed or self-employed, or of an unemployed person, one-twelfth (1/12) of the anticipated annual earnings from the time such person would reasonably have been expected to be regularly employed. In calculating the anticipated annual earnings of an unemployed person who has previously been employed, the insurer shall average the annual compensation of such person for not to exceed five (5) years preceding the year of injury or death, during which such person was employed."

> "(y) 'Survivors' benefits' means total allowances to all survivors for: (1) Loss of an injured person's monthly earnings after his or her death, up to a

> maximum of not less than six hundred fifty dollars ($650) per month; and (2) substitution benefits following the injured person's death. Expenses of the survivors which have been avoided by reason of the injured person's death shall be subtracted from the allowances to which survivors would otherwise be entitled, and survivors' benefits shall not be paid for more than one (1) year after the injured person's death, less the number of months the injured person received disability benefits prior to his or her death.

Mrs. Burriss' argument is fairly straightforward. She points out that she and her husband were covered by an insurance policy whose premium is not dependent upon his being a wage earner. Yet, on his demise in an automobile accident, she is denied survivor's benefits because he is no longer employed and gained his only income from Social Security and other pension benefits which he earned through years of active employment.

Subsection (1) provides that a person not regularly employed or self-employed, or even an unemployed person may receive benefits in the amount which could be anticipated on an annual basis had they been regularly employed.

The statute makes the insurance mandatory such that Mr. Burriss could not have opted out of it. On the other hand, the defendant points out that the K.A.I.R.A. is not a panacea. There may be individual instances where persons might not receive all the benefits another person in a slightly different situation might receive. However, the defendant asserts that the over-all purpose of the act is broad enough as to be non-discriminatory. The defendant further points out that had Mr. Burriss resumed employment, he would have still followed [sic] under the pro-

tections of the act. Additionally, the law provides disability benefits or wage loss coverage to any of Mr. Burriss' relatives who reside in his household who might be injured in an automobile accident in the State of Kansas or injured in an automobile accident in Burriss' automobile outside the State of Kansas; to any pedestrian that might be struck in the State of Kansas by the Burriss' automobile; to any person who is injured in an automobile accident in the State of Kansas while occupying the Burriss' automobile.

The defendant, therefore, indicates that Mr. Burriss was not being grossly discriminated against by this provision, but only in the particular set of circumstances that we are referring to.

As was set out in *Manzanares*, certain trade-offs are made in any scheme of law. After many years of consideration, Kansas changed its method for compensation of persons injured in certain types of motor vehicle accidents by the enactment of this act. No system is perfect, and it is not the function of the courts to modify legislative determination of public policy absent clear constitutional reasons.

Neither party has presented the Court with any statutory history concerning this particular provision. The annotated article "No Fault Automobile Insurance" by McCormick and Taylor, 23 K.L.R. 141, (1974) contains no such history and the Court has been unable to find any in its own research. However, since the rendition of the *Bradley* case in July of 1981, the Kansas legislature has met twice, and has declined to change the law in this regard. The Court must, therefore, assume that the interpretation of the *Bradley* court is correct as far as the legislature is concerned. As was set out in the case of *City*

of Baxter Springs v. Bryant, 226 Kan. 383, 598 P.2d 1051 (1979) as set out in plaintiff's brief, in determining constitutionality, it is the court's duty to uphold a statute under attack rather [sic] defeat it, and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

Regardless of whether the Court believes the provision is poor public policy or not, its decision must be based on strictly constitutional issues.

The Court feels that due to the mandatory nature of the legislation that the Court is in a position to grant relief if the Court would find this particular provision unconstitutional. The insurance industry is one of the most heavily regulated in the country and notwithstanding the defendant's response to the motion for summary judgment, the Court feels that the provisions of this particular contract are mandated by law and that a Court determination of the constitutionality of the particular statute would have the effect of altering any unconstitutional provisions contained in any legislatively mandated insurance program.

The plaintiff states that a denial of survivor's benefits to the survivors of the retired insureds, constitutes the taking of property without due process of law. As was set out above, plaintiff and her husband were required by Kansas law, as a condition of registering and operating a motor vehicle in this state, to purchase insurance, including personal injury protection provisions. Had Mr. Burriss been earning $636 per month from employment as opposed to from pension benefits, the policy and the statute would clearly entitle plaintiff to survivor's benefits in that amount. Therefore, neither plaintiff nor her husband could ever hope to receive disability benefits in the event of injury or survivor's benefits in the event of the

spouse's death. The plaintiff, therefore, states that the insureds were therefore required by Kansas law to pay for insurance coverage from which they could not possibly receive any benefit.

From the standpoint of the personal injury protection endorsement, which is a mandatory provision of the insurance policy, this is true. As was pointed out in the defendant's brief, there are many other provisions from which Mr. Burriss and his wife could benefit even if he remained retired.

The Court would agree with the plaintiff that the claims of Mrs. Burriss would be as easily administered as any other claim would be, given the precise nature of pension benefits.

The Court must ask along with the plaintiff whether there is any justification that can be presented for the denial of these benefits to someone in the Burriss' position. Other than general trade-off reasons, the Court can see none and has not been presented any by counsel for the defendant, nor has it been able to find any in its own research.

The elderly cannot be said to be in a better position to protect themselves and are certainly no less worthy of being afforded the benefits of receiving prompt compensation for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages as set out in the act.

The *Manzanares* case dealt with the question of the provision of the act which limited recovery for non-pecuniary damages such as pain, suffering, mental anguish and inconvenience. Persons injured in motor vehicle accidents having medical expenses of less than the reasonable value

of $500 were discriminated against. The Court found this to be a reasonable restriction given the policy considerations involved.

Manzanares also found that allowing motorcycle operators to opt out of the personal injury protection benefits was reasonable considering all factors involved.

The present factual situation did not lend itself to that analysis. Mr. Burriss is not discriminated against because he chose to drive a different type of motorized vehicle. He is not discriminated against because his injuries were slight and of a class which give rise to unnecessary, and sometimes even fraudulent, claims in litigation. He is discriminated against due to the source of his income.

If it could be said that there was a valid administrative reason for denying coverage in this instance, the Court would be more inclined to accept the position as set out in the legislation. However, the amounts involved here are liquidated and easily ascertained.

If the situation were such that the survivor in this general class of persons did not need the support, there would be a better foundation for the distinction. However, recipients of pension benefits are generally not in robust economic circumstances. When one deals with women of Mrs. Burriss' age group, who traditionally have had less of a work background and thereby smaller individual Social Security benefits, the need is even greater.

The Court would also note that although some recipients of Social Security or other pension benefits are not elderly, most are. The Court sees no rational argument that can be made that the elderly are generally less in need of the type of protections that are intended to be offered by the K.A.I.R.A.

As was set out in *Pinkerton v. Schwiethale,* 208 Kan. 596, 493 P.2d 200, and *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362,

> ". . . reasonable classifications of persons are permissible, for it is only inviduous discrimination which offends. A classification employed in the exercise of police power cannot be made arbitrarily. Any distinctions inherent in a particular classification must furnish a proper and reasonable basis for such classification. The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitrarily, discriminatorily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than others of the same dessert. (*The State v. Heitman,* 105 Kan. 139, 181 P. 630)

The Court noted in *Henry v. Bauder* that the Kansas death statute as it was set out in K.S.A. 8-122(b) was unconstitutional and void as a denial of equal protection under the law under the 14th Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights for the reason that the classifications provided in that statute were arbitrary and discriminatory, and had no rational basis. In that case, the court found that the statutory classification between a "non-paying guest" and "paying passenger" was not reasonable, but was in fact arbitrary and unreasonable. The present rule has less of a history behind it than the guest statute and, in the court's view, is no less arbitrary and capricious.

In the present instance, to deny survivorship benefits, flies in the face of the purpose of the act. No rational relationship has been drawn for the Court, and the Court has not been able to draw on itself between this denial of protection and the purposes of the act. The Court feels the case may be even stronger for a finding of capriciousness than was found in *Henry v. Bauder*, as in this situation the victim in addition to his injury has also been required to buy insurance which provides benefits to others in a far greater degree than it provides for him. None of the purposes for the implementation of the act are furthered by this action.

The Court will, therefore, find that insofar as Kansas Automobile Injury Reparations Act, K.S.A. 40-3101 et seq. is mandatory for all persons wishing to register and operate motor vehicles in the State of Kansas, and to the extent that it discriminates against the survivors of recipients of Social Security benefits and other pensions by the denial of payment of survivors' benefits under K.S.A. 40-3103, Subsections (l) and (y), that such provisions are unconstitutional under the 14th Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights, in that such classifications are arbitrary and discriminatory and have no rational basis. Such provisions are violative of K.S.A. 40-3102, the purpose of the Act, and deny plaintiff certain constitutional rights in that they take property without due process of law and deny her equal protection of the law.

The Court finds that judgment in the amount of $7,632 should be entered at the prejudgment rate of 10%, and that pursuant to K.S.A. 40-3110 all over-due payments shall bear simple interest at the rate of 18% per annum following the entry of judgment on this matter.

Counsel for the plaintiff is requested to draw a journal entry consistent with the findings of this memorandum decision and submit it to counsel for defendant for approval.

IT IS SO ORDERED this 26th day of September, 1983.

/s/ G. Joseph Pierron
G. Joseph Pierron
Judge of the District Court
Division III

Copies of the foregoing Memorandum Decision have been mailed, postage prepaid, to: MR. DAVID P. TROUP, Weary, Davis, Henry, Struebing & Troup, 819 North Washington Street, Junction City, Kansas 66441, and MR. PAUL HASTY, JR., Wallace, Saunders, Austin, Brown & Enochs, Chartered, P. O. Box 12290, 10111 Santa Fe Drive, Overland Park, Kansas 66212, this 26th day of September, 1983.

/s/ G. Joseph Pierron

(Filed May 10, 1983)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS

(10th Judicial District)

Case No. 83 C

JOSEPHINE BURRISS,
Plaintiff,

vs.

NORTHERN ASSURANCE COMPANY
OF AMERICA,
Defendant.

(Pursuant to K.S.A. Chapter 60)

PETITION

Comes now plaintiff, by and through her attorney David P. Troup of Weary, Davis, Henry, Struebing and Troup, and alleges and states as follows:

1) Plaintiff is a widow who resides in Overland Park, Johnson County, Kansas.

2) Defendant is an insurance company authorized to transact business in the state of Kansas and affiliated with Commercial Union Insurance Company. Defendant may be served with process by serving Fletcher Bell, Kansas Commissioner of Insurance, Kansas Insurance Department, Topeka, Kansas.

3) On October 11, 1982, plaintiff and her late husband, Lloyd Burriss, were insured by defendant under a standard motor vehicle liability policy including a personal injury protection endorsement as required by Kansas law and specifically the Kansas Automobile Injury Reparations Act (hereinafter KAIRA).

4) On October 11, 1982, plaintiff's husband, Lloyd Burriss, was fatally injured while operating the insured motor vehicle in Terre Haute, Indiana.

5) At the time of his death, plaintiff's husband was retired from active employment and was regularly receiving compensation for past employment, consisting of Social Security benefits and private pension benefits in the total sum of $687.00 per month.

6) Solely by reason of the death of plaintiff's husband in the said automobile accident, a private pension benefit ceased and the Social Security benefits were reduced to $51.00 per month, for a total monthly loss to plaintiff, the surviving spouse, of $636.00.

7) Plaintiff, as Lloyd Burriss's "survivor," is entitled to and has made demand upon defendant for payment of survivor's loss in the amount of $636.00 per month commencing November 1, 1982, and continuing for a period of twelve (12) months thereafter.

8) By letter dated May 6, 1983, defendant has denied payment of survivor's benefits, relying upon the decision of the Kansas Court of Appeals in *Bradley v. AID Insurance Co.*

COUNT I

9) The foregoing allegations are incorporated herein by reference.

10) Pursuant to K.S.A. 60-1701 *et seq.*, this case involves an actual controversy and plaintiff seeks declaratory relief as authorized therein.

11) The KAIRA, as construed by the Kansas Court of Appeals to deny survivor's benefits to the surviving spouse of a retired person, is unconstitutional in that it denies plaintiff and those similarly situated equal protection of the laws contrary to the 14th Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights.

12) The KAIRA, as construed by the Kansas Court of Appeals to deny benefits to certain individuals while nevertheless requiring them to pay a premium therefor is an unconstitutional deprivation of property without due process of law, contrary to the 14th Amendment to the United States Constitution and Section 18 of the Kansas Bill of Rights.

13) Plaintiff is entitled to declaratory relief that to the extent the KAIRA and specifically the definitions employed in K.S.A. 40-3103(l), (y), purport to deny survivor's benefits to this plaintiff and other similarly situated, it is unconstitutional. Plaintiff is further entitled to a judgment declaring that the insurance policy in question be reformed in conformity with a constitutional construction of the KAIRA which would entitle plaintiff to recover "survivor's benefits," to compensate her for the loss she has incurred by reason of the death of her husband in a covered motor vehicle accident.

COUNT II

14) The foregoing allegations are incorporated herein by reference.

15) Plaintiff is entitled to recover survivor's benefits from defendant in the amount of $636.00 per month for a period of twelve (12) months from November 1, 1982, and is further entitled to recover interest on said amounts at the lawful statutory rate until paid.

16) Plaintiff expressly reserves her claim for entitlement to "substitution benefits" for loss of her husband's essential services.

WHEREFORE, plaintiff PRAYS for the following relief:

1) A declaratory judgment that the insurance policy in question and the KAIRA provisions upon which it is based are unconstitutional to the extent they purport to eliminate plaintiff's entitlement to recover the financial loss suffered by reason of her husband's death.

2) A declaratory judgment that the insurance policy in question be constitutionally construed to authorize and require defendant to pay plaintiff such financial loss.

3) Judgment in the amount of $7,632.00, to be paid at the rate of $636.00 per month commencing November 1, 1982, together with interest at the statutory rate until paid.

4) Her costs incurred herein.

5) Such other and further relief as to the Court seems just and equitable.

WEARY, DAVIS, HENRY, STRUEBING & TROUP

Attorneys for Plaintiff

By /s/ David P. Troup
David P. Troup

Office - Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1844

In The
Supreme Court of the United States
October Term, 1984

JOSEPHINE BURRIS,

Petitioner,

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,

Respondent.

BEST AVAILABLE COPY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Rule 28.1 Statement-Parent Companies, Subsidiaries and Affiliates of North Assurance: American Employers Ins. Co., Commercial Union Ins. Co., Commerical Union Life Ins. Co. of America, Employers' Fire Ins. Co., and Employers' Surplus Lines Ins. Co.

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No. 84-1844

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In The
Supreme Court of the United States
October Term, 1984

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JOSEPHINE BURRIS,

Petitioner,

vs.

NORTHERN ASSURANCE COMPANY OF AMERICA,

Respondent.

—o—

MOTION TO DISMISS OR AFFIRM APPEAL FROM SUPREME COURT OF KANSAS

—o—

The Respondent moves the Court to dismiss the petition for certiorari and/or appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kansas on the ground that it is manifest that the questions of which the decision of the cause depends are so unsubstantial as not to need further argument.

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I. THE CONTRACT AND STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Contract

This case arises out of a contract entered into by the Petitioner, Northern Assurance Company of America, and the Petitioner's husband who died in a motor vehicle accident. The Petitioner has made claim for certain benefits provided under the motor vehicle liability insurance contract of Respondent. Respondent claims that the contract did not provide the benefits that the Petitioner claims. The particular benefits are the "survivor's benefits" as provided in the personal injury protection endorsement of Respondent's policy. Respondent claims that no premium was paid for these benefits and the policy does not provide these benefits under the circumstances of this case. Petitioner contends that the law which empowers the Respondent to deny the benefits claimed by the Petitioner in the contract is unconstitutional. As such, the Petitioner asks that the law be held unconstitutional and the contract be reformed or, in this case, broadened so as to provide the benefits in this situation. Respondent contends that the individual contract controls and the policy cannot be reformed to broaden coverage even if the law were to be declared unconstitutional.

B. The Statutes

The petition for certiorari raises the question of the validity of certain provisions of the Kansas Automobile injury Reparations Act, K.S.A. 40-3101 through K.S.A. 40-3121, as amended. Specifically, the statutes being at-

tacked are K.S.A. 40-3103(l) and K.S.A. 40-3103(y). Those statutes provide as follows:

"K.S.A. 40-3103

(l) 'Monthly earnings' means: (1) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury; or (2) in the case of a person not regularly employed or self-employed, or of an unemployed person, one-twelfth (1/12) of the anticipated annual earnings from the time such person would reasonably have been expected to be regularly employed. In calculating the anticipated annual earnings of an unemployed person who has previously been employed, the insurer shall average the annual compensation of such person for not to exceed five (5) years preceding the year of injury or death, during which such person was employed."

"K.S.A. 40-3103

(y) 'Survivors' benefits' means total allowances to all survivors for: (1) Loss of an injured person's monthly earnings after his or her death, up to a maximum of not less than six hundred fifty dollars ($650) per month; and (2) substitution benefits following the injured person's death. Expenses of the survivors which have been avoided by reason of the injured person's death shall be subtracted from the allowances to which survivors would otherwise be entitled, and survivors' benefits shall not be paid for more than one (1) year after the injured person's death, less the number of months the injured person received disability benefits prior to his or her death."

These statutes set forth the benefits which are to be provided survivors under the Kansas Automobile Injury Reparations Act. The precise determination of what benefits apply also incorporate provisions of other statutes

in the KAIRA such as K.S.A. 40-3103(q) which defines "personal injury protection benefits" as including disability benefits, funeral benefits, medical benefits, rehabilitation benefits, substitution benefits and survivors' benefits required to be provided in motor vehicle liability insurance policies pursuant to the KAIRA. Also, K.S.A. 40-3104 requires that all owners of motor vehicles in Kansas have an insurance policy in effect which provides these personal injury protection benefits pursuant to K.S.A. 40-3107 that are applicable under the situations described in K.S.A. 40-3109.

C. The Proceedings Below

The Petitioner is the widow of Lloyd Burris, who was the owner of a motor vehicle that had insurance coverage which complied with the KAIRA. Mr. Burris died in an automobile accident. The Petitioner filed suit to recover survivors' benefits for $153.00 per month for loss of a private pension and a decrease of $483.00 per month for social security benefits which Mr. Burris had received.

The Respondent denied coverage for these benefits because they do not constitute survivors' benefits as they are not monthly earnings so as to qualify for a covered benefit under the personal injury protection benefits coverage. Mr. Burris was unemployed at the time of his death, having previously retired.

On May 10, 1983, Petitioner filed a declaratory judgment action claiming that the KAIRA was unconstitutional and violated the Fourteenth Amendment of the United States Constitution claiming that it denied retired persons and their survivors equal protection of the law and due process of law. Petitioner filed a motion for judg-

ment on the pleadings and Respondent filed a motion for summary judgment. The trial court ruled that the statutes of the KAIRA were unconstitutional and discriminated against retired persons. Respondent filed an appeal to the Kansas Supreme Court which was decided on November 30, 1984, wherein the Kansas Supreme Court in a unanimous decision reversed the lower court's ruling. The Kansas Supreme Court found that the KAIRA did not violate the equal protection and due process rights of Petitioner as there was a reasonable basis for the distinction between wage earners and non-wage earners.

Petitioner filed a motion for rehearing before the Kansas Supreme Court which was denied.

II. ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

1. Petitioner cites as a basis for certiorari that the question of whether the KAIRA treats survivors of wage earners and non-wage earners differently is of "national concern" because of the number of state enacted mandatory insurance programs. Clearly, this is an insufficient basis for establishing a "substantial" federal question so as to come within United States Supreme Court's jurisdiction. There are fifty states with fifty different and varying laws governing motor vehicle liability insurance. The states have the right to enact these laws governing their residents and owners and operators of motor vehicles within their jurisdiction. The states were specif-

ically given this right under the McCarren-Ferguson Act 15 U.S.C. § 1011, et seq. Because of the various different kinds of motor vehicle liability insurance laws in the various different states, a decision on whether the Kansas law governing its treatment of survivors of wage earners and non-wage earners is not substantial and not of national concern. A decision on this point would have no bearing upon the other states' motor vehicle insurance systems because of the wide variance in those systems.

For example, Kansas has adopted a form of no-fault automobile insurance. To have a no-fault insurance plan, generally three elements must exist. The first is that motor vehicle liability insurance be compulsory. (K.S.A. 40-3104). Second, is that all policies of motor vehicle liability insurance provide first party benefits. (K.S.A. 40-3109). And, third, is the right to sue in tort for pain and suffering be limited in certain situations. (K.S.A. 40-3117). Twenty-three states are *considered* to have some form of no-fault insurance.[1] This is misleading

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[1] See Ark.Stat.Ann. §§ 66-4014 to -4021 (Supp. 1980) (effective July 1, 1974); Colo.Rev.Stat. §§ 10-4-701 to -4-723 (1974 & Supp. 1980) (effective April 1, 1973); Conn.Gen. Stat. §§ 38-319 to -351a (1979) (effective Jan. 1, 1973); Del.Code Ann. tit. 21, § 2118 (1979) (effective Jan. 1, 1973); Fla.Stat.Ann. §§ 627-730, -741 (West 1972 & Supp. 1980) (effective Jan. 1, 1972); Ga. Code §§ 56-3401b to -3413b, 56-9915.2 (1977 & Supp. 1980) (effective March 1, 1975); Hawaii Rev.Stat. §§ 294-1 to -41 (Supp. 1980) (effective Sept. 1, 1974); Ill.Rev.Stat. ch. 73, §§ 1065.150 to .163 (1971) (held unconstitutional on April 17, 1972); Kan.Stat.Ann. §§ 40-3101 to -3121 (Supp. 1979) (effective Jan. 1, 1974); Ky.Rev.Stat. §§ 304-39.010 to -340 (Supp. 1980) (effective July 1, 1975); Md.Ann. Code art. 48A, §§ 538-546 (1979 & Supp. 1980) (effective Jan. 1, 1973);

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however, because eight of those states have "add-on" plans which merely require that first party benefits be provided in the motor vehicle liability policies purchased in those states, but have no restriction on the right to sue. Those states are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas and Virginia.

One state, Michigan, is considered to have a "pure" plan of no-fault which totally restricts the right to sue in tort and requires substantial first party benefits. While Michigan is considered to be a "pure" state, technically it does not quite reach that point because suits can be brought in certain instances.

The remaining thirteen states are considered to have "modified plans" of no-fault insurance. They are Colorado, Connecticut, Florida, Georgia, Hawaii, Kentucky, Massachuetts, Minnesota, New Jersey, North Dakota,

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Mass.Ann. Laws ch. 90 § 34A-340; ch. 175, § 113B, ch. 231, § 6d (Michie/Law. Co-op 1975 & Supp. 1980) (effective Jan. 1, 1971); Mich. Stat. Ann. §§ 24.13101 to -.13321 (Supp. 1980) (effective Oct. 1, 1973); Minn.Stat. §§ 65B.41 to .71 (West Supp. 1980) (effective Jan. 1, 1975); Nev.Rev.Stat. § 698.010 to .510 (1979) (repealed effective Jan. 1, 1980); N.J.Stat. Ann. §§ 39:6B-1 to -20 (West 1973 & Supp. 1980) (effective Jan. 1, 1976); Or.Rev.Stat. §§ 743 to -786.930 (1979) (effective Jan. 1, 1972); Pa.Stat.Ann. tit. 40, § 1009.101 to .1701 (Purdon Supp. 1980-81) (effective July 19, 1975); S.C. Code §§ 56-11-10 to -11-800 (Supp. 1979) (effective Oct. 1, 1974); S.D. Comp. Laws Ann. §§ 58-23-1 to -23-8 (1978 & Supp. 1978) (effective Jan. 1, 1972); Tex.Ins. Code Ann. art. 5.06-3 (Vernon Supp. 1979) (effective Aug. 27, 1973); Utah Code Ann. §§ 31-41-1 to 41-14 (1974 & Supp. 1979) (effective Jan. 1, 1974); Va. Code §§ 38.1-380.1, 380.2 (Supp. 1980) (effective July 1, 1972).

Pennsylvania, Utah and Kansas. Of these "modified plans" the benefits they provide on a first party basis and the restriction on the right to sue, vary in each state. It is safe to say that there are no two state no-fault systems which are the same. And, there are only twelve other states that have a system which is fundamentally similar to that of Kansas. But, each of these state plans differ from Kansas. Therefore, the question that petitioner has presented herein is not of national concern, and would affect no state's no-fault system other than Kansas. Therefore, the Court should not be misled by petitioner's argument that this case presents a substantial federal question. Petitioner's arguments are not novel.

No fault laws have been challenged as being unconstitutional on many different occasions. The constitutionality of these laws has been upheld in eleven instances, including Kansas. (See, *Manzanares v. Bell,* 214 Kan. 589, 522 P.2d 1291 (1974); *Pinnick v. Cleary,* 360 Mass. 1, 271 N.E.2d 592 (1971) 43 ALR3d 194; *Montgomery v. Daniels,* 38 NY2d 41, 340 N.E.2d 444, 378 NY2d 1 (1975); *Lasky v. State Farm Ins. Co.,* 296 So.2d 9 (Fla. 1974); *O'Donnell v. State Farm Ins. Co.,* 70 Mich.App. 487, 245 N.W.2d 801 (1976); *Rybeck v. Rybeck,* 141 N.J.Super. 481, 358 A.2d 828 (1976); *Gentile v. Altermatt,* 169 Conn. 267, 363 A.2d 1 (1975); *Singer v. Sheppard,* 464 Pa. 387, 346 A.2d 897 (1975); *Shavers v. Attorney General of Michigan,* 65 Mich.App. 355, 237 N.W.2d 325 (1975); *Faun v. McGuffey,* 534 S.W.2d 770 (Ky. 1975); *Kluger v. White,* 281 So.2d 1 (Fla. 1973). Therefore, Respondent's argument that the Court should accept jurisdiction because the question involving Kansas law is of national concern is incorrect and does not present a substantial federal question.

2. There is no substantial question of federal law presented for this Court to decide regarding the Kansas law allowing for the recovery of survivors' benefits under the KAIRA for losses of wage earners as opposed to losses of retirement income.

Petitioner claims that this issue is of national concern because under the Kansas law the Kansas Supreme Court has treated social security and retirement income differently than other income. Respondent contends that this argument is self-defeating. Petitioner admits that even Congress has treated social security and retirement benefits differently from other income, citing examples of how the benefits are treated differently under garnishment, termination procedures, and bankruptcy. This argument is self-defeating because if Congress recognizes a difference between these benefits and other income, then it would not appear to be discrimination and a violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution for Kansas to treat these benefits differently. It would appear that this difference in treatment by the United States Congress confirms the reasonableness of the classification by the Kansas Legislature.

3. The Kansas Legislature's treatment of survivors' benefits under the KAIRA by distinguishing between wage earners and non-wage earners is constitutional and is not a denial of equal protection or due process of law. The test utilized in determining if a legislative enactment violates equal protection principles is whether the classification bears a rational relation to the purpose of the legislation. *McDonald v. Board of Election,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969). The legislature is pre-

sumed to act within its constitutional power despite the fact that the application of this loss may result in some inequity. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961).

The equal protection clause goes no further than to prohibit invidious discrimination. *Williamson v. Lee Optical,* 348 U.S. 483, 99 L.Ed 563, 75 S.Ct. 461 (1955). The Supreme Court has consistently recognized that the Fourteenth Amendment to the United States Constitution does not deny to states the power to treat different classes of persons in different ways. *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971). The Court is not the superintendent of legislative activity under principles of equal protection. *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). The principle of equal protection is not offended against simply because the exercise of the power may result in some inequality. *Louisville & Nashville R.R. v. Melton,* 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676 (1910). The state enjoys a wide range of discretion in distinguishing, selecting and classifying and it is sufficient that a classification is practical and not palpably arbitrary. *Orient Insurance Co. v. Daggs,* 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281 (1899). In the areas of economic and social legislation, a statutory plan does not violate the equal protection clause merely because the classifications contained therein are imperfect. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974). Nor does the equal protection clause require a state to choose between attacking every aspect of a problem or not attacking the problem at all. *Dandridge v. Williams,* 397 U.S. 471, 25 L.Ed. 2d 491, 90 S.Ct. 1153 (1970). As Justice Douglas said:

> "The problem of legislative classification is a perineal one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. (Citation) Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citations). The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical, supra,* 348 U.S. at 489, 99 L.Ed. at 573, 75 S.Ct. at 465 (1955).

The Kansas Supreme Court examined the foregoing stated rules and decided that the reasonable basis test is the yardstick under which the statute must be measured both as to equal protection and as to due process. The Court then determined that there was a reasonable basis for the distinction between wage earners and non-wage earners.

In so doing, the Court cited numerous Kansas laws which distinguished between non-wage earners and wage earners. The Court cited K.S.A. 60-2307 which made personal property exempt from attachment or execution for wages; K.S.A. 44-312 which gives preference to payments of wages in the case of receiverships or assignments for the benefits of creditors; K.S.A. 60-2310 which restricts garnishment of wages; and K.S.A. 44-3113, the wage payment act. The Court noted that K.S.A. 40-3103 gives preference to wage earners as do the other statutes so as to make sure that families dependent upon these wages do not become destitute. The Court noted that the Legislature could have included within K.S.A. 40-3103 pensions, retirement income, payments in life estates, an-

nuities and lifetime trusts, alimony and other forms of income as "monthly earnings", but it choose not to do so.

As such, the Court did not simply distinguish between employed persons and those receiving social security retirement benefits, but made a distinction between those who are employed and those who are not. The Court noted that this distinction was rational in that the legislation was designed to protect wage earners and those dependent upon them. The protection was for the immediate loss of wages which has become immediately interrupted or terminated. The Court noted that non-employed persons do not sustain the same loss. The Court suggested that extending the same protection to all persons injured in motor vehicle collisions would greatly increase the coverage and thus greatly increase the cost of the insurance program in Kansas.

For the foregoing reasons, the KAIRA which distinguishes between benefits which are provided to wage earners and those who are not wage earners does not constitute a violation of the equal protection or due process clauses of the Fourteenth Amendment of the United States Constitution. The Kansas Legislature had the authority and the power to enact laws such as the KAIRA. In so doing, they made a decision as to who would be entitled to survivors' benefits under the Act. The Legislature has chosen to establish a classification allowing dependents of wage earners to obtain survivors' benefits whereas dependents of non-wage earners are not entitled to survivors' benefits. The Legislature had the power to make this classification, and it was based upon reasonable grounds to further the legislative objective of protecting those who were earning incoming and their dependents

and survivors. As such, this classification was rational and does not constitute a denial of equal protection or due process.

Therefore, the decision of the Kansas Supreme Court is a proper interpretation of the constitutionality of the Kansas Automobile Injury Reparations Act and should be affirmed by this Court.

4. Respondent contends that this case does not present a substantial question for the United States Supreme Court to decide because the action rests solely on the terms of an individual insurance contract entered into between the Respondent and Petitioner and is not based upon the statutory law as claimed by Petitioner.

An examination of the terms of the contract in light of the applicable law in force at the time of making, clearly reveals that the contract does not provide for the payment of lost social security or pension benefits. It is important to note that the Respondent's denial of benefits requested by the Petitioner is based not upon the existence of any statute, but rather upon the terms of the contract which represents the intentions of both parties at the time of the making.

The fact that the rights and obligations of the respective parties must be determined by the terms of this contract, and the fact that the contract presently does not provide for payment of lost social security or pension benefits, were admitted by the Petitioner in her petition. There, the Petitioner specifically requested that "the insurance policy in question be reformed into conformity with a constitutional construction of the KAIRA which would entitle plaintiff to recover 'survivors' benefits' to

compensate her for the loss she has incurred by reason of the death of her husband in the covered motor vehicle accident." Although the Petitioner recognizes that reformation of the contract is necessary if she is to recover against the Respondent, she has failed to allege proper grounds for reformation of this contract. (See, Restatement Second, Contracts § 155).

Assuming that the contract entered into by these parties in some way discriminates against social security recipients in that they pay the same premium but yet do not stand to receive the same potential benefits as similarly situated wage earners, this is not enough to state a cause of action against the Respondent. The major thrust behind the Petitioner's cause of action is that her constitutional rights, namely her right to due process and equal protection under the laws, have been violated. The constitutional protection which plaintiff has invoked in this case applies only to state actions. (United States Constitution, Amendment XIV, (1816)). Private conduct, however discriminatory, is not subject to review under the Fourteenth Amendment. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477, (1974). Clearly, the constitutional wrongs which defendant alleges does not provide a basis for reforming this contract which was freely entered into by private parties. While there may be situations where the actions of private entities may be treated as actions of the State, the case at bar is not such a situation. Inasmuch as the Petitioner has failed to allege that the Respondent's actions should be treated as the actions of the State, the petitioner fails to state a cause of action based upon her constitutional challenges. When analyzing the actions of the Respondent insurance company for possible state

action, it is important to note "the mere fact that a business is subject to state regulations does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment to the United States Constitution. Nor does the fact that the regulation is extensive and detailed, . . . " *Jackson, supra,* at p. 350. Moreover, it is important to note that government action does not exist merely because an entity performs a public function. The proper question is whether the function performed has been traditionally the exclusive perogative of the State. *Gomez v. North Dakota Rural Development Corp.,* 704 F.2d 1056, 1059 (8th Cir. 1983). Because the issuance of insurance policies has not been traditionally the exclusive perogative of the State, the actions of the Respondent in issuing this contract of insurance appear to be purely private and not subject to review under the Fourteenth Amendment of the United States Constitution.

When examining the Petitioner's claims with respect to the constitutionality of the Kansas statute, it is apparent that the Petitioner in this suit has named the wrong party as defendant. Petitioner claims that the statute amounts to a taking without due process of law, but fails to allege any wrongdoing by the named defendant. It was the State of Kansas which required the Petitioner to purchase the coverage, not the Respondent. It there was a taking, then the taking was not by the Petitioner, but by the State of Kansas. Clearly, the allegations contained in the due process portion of plaintiff's petition and memorandum and writ of certiorari do not state a cause of action upon which relief can be granted against this Petitioner.

Similarly, the Petitioner's attacks on the statute, based on equal protection, do not state a cause of action against the Petitioner. If the State of Kansas had enacted the statute which violates the Constitution by denying Petitioner equal protection of the laws, and if the Petitioner has suffered damages by reason of this unconstitutional act, then the Petitioner should seek redress from the State and not from the Petitioner insurance company.

As such, this action on the contract by the Petitioner against the Respondent presents an individual contract question and not a substantial federal question to empower the United States Supreme Court to grant jurisdiction or certiorari. Therefore, jurisdiction and certiorari should be denied.

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III. CONCLUSION

WHEREFORE, Respondent respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Respondent respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Kansas.

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